

Opinion
of the
Independent Ethical Committee
established
by the European Commission
14 October 2020

Subject: Request for an opinion on Former Commissioner Günther Oettinger's envisaged post term of office activity as Member of the Global Advisory Board of Kekst CNC

On request of the President of the European Commission, the Independent Ethical Committee, composed of Ms Dagmar Roth-Behrendt, Mr Allan Rosas and Mr Heinz Zourek, delivers the present opinion:

Procedure

1. On 25 September 2020, the Secretary-General of the Commission asked the Committee, on behalf of the President of the Commission, to deliver an opinion on the compatibility of former Commissioner Günther Oettinger's envisaged post-term of office activity as Member of the Global Advisory Board of Kekst CNC with Article 245 of the Treaty on the Functioning of the European Union.

Facts

General information on Kekst CNC

2. According to the information made publicly available by the company, Kekst CNC is a global strategic communications consultancy firm that 'helps global business and institutional leaders' to address strategic and communications challenges and opportunities on a global level. Kekst CNC 'partners with clients to develop and execute the necessary integrated communications strategies to gain the confidence of key stakeholders'.
3. Kekst CNC, which resulted from the merger of two strategic communication firms, Kekst and CNC, in 2018, is part of Publicis Groupe, which is a large global

communications group. Kekst CNC's headquarters are located in Munich (Germany). Kekst CNC has offices in 13 cities in Europe, Asia, the United States and the Middle-East, including one in Brussels.

4. According to the website of Kekst CNC, the company's activities focus on the following twelve areas:

- 'Strategic Counsel and Financial Communications': under this heading, the firm refers to advice on corporate reputation and public relations in financial matters;
- 'Transactions': this activity consists in advising and delivering support on mergers and acquisitions transactions as well as equity capital market;
- 'Financial and corporate restructuring and insolvency': this activity entails guiding companies in distressed situations such as creditor negotiations, restructurings or workforce actions;
- 'Shareholder Activism and Corporate Governance': the company's activity under this heading consists of preparing client companies to respond effectively to activists investors and their agenda;
- 'Purpose, Sustainability and Environmental, Social and Governance Issues ('ESG')': this activity consists of helping client organisations in applying ESG frameworks and ensuring more transparency;
- 'Alternative Investments': under this heading, Kekst CNC advises clients on media presence and public attention, as well as raising awareness within the institutional landscape;
- 'Crisis and Issues Management': this activity entails helping companies to manage crisis through the creation of crises plans and teams;
- 'Cyber Security': the company's activity under this heading consists of advising clients of cyber crisis management and creating cyber risk assessments;
- 'Litigation support': Kekst CNC prepares customised communications strategies and plans for engaging with the media and affected stakeholders during a legal process;
- 'Change communications': this activity consists of supporting clients through tailored change communications during periods of transition and transformation;
- 'Data, Research and Insights': Kekst CNC provides clients with access to market leading analytics tools;
- 'Public Affairs': under this heading, the company provides services related to stakeholder engagement, campaigning, advocacy and analyses on the existing regulatory and political framework. Kekst CNC also advises clients on the EU environment, providing strategy development, policy advice and help to outreach to policy makers at EU and Member States levels.

The organisational structure of Kekst CNC

5. According to publicly available information, Kekst CNC is managed by a 'partner group', composed of the company's partners. The company as such has a team of

appr. 250 professionals. The partner group is supported by a Global Advisory Board which is currently composed of five members.

6. The aim of Kekst CNC's Global Advisory Board is to bring 'together some of the most experienced practitioners from the world of communications, business, politics, finance and tech to support the growth of the firm'. According to the information provided by former Commissioner Oettinger, the Board 'helps to broaden and enhance Kekst CNC's global reputation and visibility among senior opinion-leaders and decision-makers [...] and support business development activities'. The Global Advisory Board's role includes supporting Kekst CNC in building strategic alliances and 'identifying new revenue streams'.

Former Commissioner Oettinger's position at Kekst CNC

7. Former Commissioner Oettinger informed the Commission that he was invited to join the Global Advisory Board of Kekst CNC. In this position, he would be expected to 'provide intelligence and exclusive advice on global macro-economic and geopolitical trends and developments'. The board meets with the partner group of Kekst CNC 'approximately once a year'.]

Links of Kekst CNC with the European Commission

8. The Financial Transparency System of the European Commission does not contain any records of funding received by Kekst CNC Group or by Publicis Groupe from the EU budget. According to its website and as stated above, Kekst CNC 'advise[s] clients in [...] advocacy, including stakeholder engagement and outreach to policy makers at EU and Member State level'.
9. Kekst CNC is registered in the Joint Transparency Register of the European Parliament and the Commission as a consultancy company, as is Publicis Groupe. There is no record in the register of any meeting held with representatives and/or Members of the European Commission.

Legal context

10. Article 245 of the Treaty on the Functioning of the European Union (TFEU) provides:

The Members of the Commission shall refrain from any action incompatible with their duties. Member States shall respect their independence and shall not seek to influence them in the performance of their tasks.

The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their

duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 247 or deprived of his right to a pension or other benefits in its stead.

11. Article 339 of the Treaty on the Functioning of the European Union (TFEU) provides:

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

12. Article 15(1) and (2) of the Charter of Fundamental Rights of the European Union provides:

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

13. Article 2(7) of the Code of Conduct for the Members of the European Commission (hereafter the ‘Code of Conduct’) provides:

7. Former Members shall respect the obligations arising from their duties that continue to have an effect after their term, in particular the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits in line with Article 245 of the Treaty on the Functioning of the European Union, and the obligations specified in this Code of Conduct.

14. Article 5 of the Code of Conduct provides:

1. Members shall comply with the duty of loyalty towards the Commission and discretion in discharging their duties. They shall act and express themselves with the restraint that their office requires.

2. Members shall refrain from disclosing what is said at meetings of the Commission.

3. Without prejudice to the disciplinary provisions applicable to officials and other agents, Members are responsible for the proper handling and any external transmission by members of their Cabinets of classified documents, of sensitive information or of confidential documents submitted to the College for adoption or information.

4. Members shall not make any comment that would call into question a decision taken by the Commission or which may harm the Commission's reputation.

15. Article 11 of the Code of Conduct provides:

1. After ceasing to hold office, former Members shall continue to be bound by their duty of integrity and discretion pursuant to Article 245 of the Treaty on the Functioning of the European Union. They shall continue to be bound by the duties of collegiality and discretion, as laid down in Article 5, with respect to the Commission's decisions and activities during their term of office.

2. Former Members shall inform the Commission with a minimum of two months' notice of their intention to engage in a professional activity during a period of two years after they have ceased to hold office. For the purposes of the present Code, 'professional activity' means any professional activity, whether gainful or not, other than any unpaid activity which has no link with the activities of the European Union and which does not give rise to lobbying or advocacy vis-à-vis the Commission and its services such as:

- (a) charitable or humanitarian activities;*
- (b) activities deriving from political, trade unionist and/or philosophical or religious convictions;*
- (c) cultural activities;*
- (d) the mere management of assets or holdings or personal or family fortune, in a private capacity;*
- (e) or comparable activities.*

3. The Commission shall examine the information provided in order to determine whether the nature of the planned activity is compatible with Article 245 of the Treaty on the Functioning of the European Union, and if the planned activity is related to the portfolio of the former Member, it shall decide only after having consulted the Independent Ethical Committee.

Without prejudice to the possibility for the President to seek its opinion in cases of doubt, the Independent Ethical Committee does not need to be consulted where former Members intend to:

- (a) continue to serve the European interest in an Institution or Body of the European Union;*
- (b) take up functions in the national civil service of a Member State (at national, regional or local level)*
- (c) engage with international organisations or other international bodies dealing with public interests and in which either the EU or one or several of its Member States are represented;*
- (d) engage in academic activities;*
- (e) engage in one-off activities for a short duration (1 or 2 working days);*
- (f) accept honorary appointments.*

4. Former Members shall not lobby Members or their staff on behalf of their own business, that of their employer or client, on matters for which they were responsible within their portfolio for a period of two years after ceasing to hold office.

5. In the case of a former President, the periods set out in paragraphs (2) and (4) shall be three years.

6. The duties set out in paragraphs (2) and (4) shall not apply where the former Member is engaging in public office.

7. Decisions taken under paragraph (3) determining compatibility with Article 245 of the Treaty on the Functioning of the European Union and related opinions of the Independent Ethical Committee shall be made public with due consideration to the protection of personal data.

Opinion

16. The Committee notes that Members of the Commission have a right to engage in work and to pursue a freely chosen or accepted occupation after the term of their office. This right needs to be balanced with the obligations set out in Article 245 of the Treaty on the Functioning of the European Union and the Code of Conduct for Members of the European Commission, which develops these obligations in more detail.
17. Former Commissioner Oettinger intends to accept a position as member of the Global Advisory Board of the company Kekst CNC. In that capacity, he would be expected to ‘provide intelligence and exclusive advice on global macro-economic and geopolitical trends and developments’.
18. The role of the Global Advisory Board is to ‘broaden and enhance Kekst CNC’s global reputation and visibility among senior opinion-leaders and decision-makers’ as well as advising partners on strategic issues. Members of the Global Advisory Board are not responsible for day-to-day management activities but act as advisors to the partner group to ‘support business development activities’. Moreover, the actual duties linked to the membership in the Global Advisory Board seem to be moderate given that the Board only meets with the partner group ‘approximately’ once a year.
19. As regards financial commitments, the Committee has taken note that neither Kekst CNC nor Publicis Groupe, which owns the company, has received funding from the European Union budget over the last years according to the Commission’s Financial Transparency System. The Committee has also taken note that, according to publicly available information, Kekst CNC has not met with Members of the European Commission or their Cabinets.

20. Based on this information, the Committee does not see an incompatibility with Article 245 TFEU as long as former Commissioner Oettinger respects the general obligations applying to former Members of the Commission.
21. However, advisory functions of the kind performed by Kekst CNC constitute by their very nature a potential risk that specific information or insights that former Commissioner Oettinger obtained during his mandate could be relevant for business decisions of Kekst CNC and notably its clients. This can concern information obtained in areas of the previous portfolios of the former Commissioner, but also areas in which he was involved as a Member of the College.
22. Hence, the Committee recommends that the Commission should recall and explicitly spell out in its decision a number of restrictions in order to ensure the compatibility of the activity with the obligations applying after the end of the mandate.
23. The Committee considers it important that former Commissioner Oettinger is fully aware of his obligations as former Member of the Commission, which continue to apply after his term of office and recommends emphasising the need to have a prudent approach when providing strategic advice to Kekst CNC.
24. Moreover, while the membership in the Global Advisory Council does not involve lobbying activities on behalf of the company, the Commission decision should nevertheless recall that Article 11(4) of the Code also applies to this activity for a period of two years after the end of the term of office. This article provides that *'Former Members shall not lobby Members or their staff on behalf of their own business, that of their employer or client, on matters for which they were responsible within their own portfolio'*. The decision should explicitly mention that former Commissioner Oettinger should not provide any advice to Kekst CNC on direct or indirect lobbying of the Commission by Kekst CNC or its clients, even on matters for which he was not responsible in his former portfolios.
25. The decision should also recall that, according to Article 339 TFEU, Members of the Commission are required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their costs components.
26. The Committee recommends that the Commission decision should underline the importance of complying with the duties of collegiality and discretion, as laid down in Article 11(1) and Article 5 of the Code, with respect to the Commission's decisions and activities during former Commissioner Oettinger's term of office. Consequently, he must not disclose anything that was said at meetings of the Commission, or call into question decisions taken by the Commission during these periods.

27. The decision should also recall that former Commissioner Oettinger must show in general a high sense of discretion with regard to the use of information and insights that he obtained in the performance of his duties, be it with regard to the functioning of the Commission or the Commission's relations with other institutions, Member States, third countries or third parties. He should not provide the benefit of any insights of a confidential or sensitive nature in policy, strategy or internal processes that he obtained during his terms of office, to Kekst CNC.
28. Finally, the Commission decision should recall that, in case former Members have a doubt with regard to their obligations, they must inform the President of the Commission in a timely manner and before acting on the matter relating to which the doubts arise, according to Article 13(2) of the Code.
29. Therefore, based on the above-mentioned information and considerations, the Committee concludes that the envisaged activity would be compatible with Article 245 TFEU, subject to the respect of the above-mentioned commitments and the conditions specified in this opinion.

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